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| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ANDERSON | Civil Action No. 2009-CP-04-4482 |
| Anderson County,<br><br>Plaintiff,<br><br>vs.<br><br>Joey Preston and the South Carolina Retirement System,<br><br>Defendants. | **PRESTON'S MEMORANDUM OPPOSING MOTION FOR INTERVENTION** |

Defendant Joey Preston ("Preston") respectfully submits the instant Memorandum Opposing Richard Freemantle's ("Freemantle") Motion to Intervene ("Motion").

## INTRODUCTION

Freemantle's objective in pursuing the instant Motion proves singular, transparent, and wholly improper—to perpetuate an appeal and interfere with any possible early resolution of a case in which he is neither a party nor has any interest.[1] Waiting over forty (40) months after he first learned of the above-captioned lawsuit, Freemantle now—after trial and final judgment—seeks to intervene in the instant case. Freemantle's Motion suffers from facial defects and is riddled with substantive legal deficiencies. The problem with Freemantle's Motion is not that he "got something" wrong but rather he failed "to get" anything right.

Freemantle's Motion altogether fails. The following defects *inter alia* prove fatal to Freemantle's Motion:

[1] Freemantle's actions may also constitute an abuse of process, *see, e.g., Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693, 695 (1967), and tortious interference with prospective contractual relations. *See, e.g., Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266 (1990).

- Freemantle waited nearly three and a half years before moving to intervene rendering his Motion untimely and substantially prejudicial.

- The Motion fails to state the basis supporting the same, including failing to state the claims Freemantle desires to assert, whether he seeks to intervene as Plaintiff or Defendant, whether he moves of right or permissively, what interest he claims in the lawsuit, what statutes he relies upon for intervention, and what claims or defenses purportedly overlap.

- Freemantle's Motion violates Rule 7(b), SCRCP's particularity requirement.

- Freemantle's Motion violates Rule 11(a), SCRCP's certification requirement.

- Freemantle's Motion violates Rule 24(c), SCRCP's mandate to attach a proposed pleading.

- Freemantle's Motion violates controlling precedent requiring a party to have standing and also constitute a real party in interest in order to support intervention.

- Freemantle's Motion, if granted, would substantially prejudice Preston's rights to defend himself.

- Freemantle's Motion lacks any supporting affidavits or competent evidentiary materials.

- Freemantle's Motion fails to explain why the County inadequately protects interests relating to the Severance Agreement.

As explained more fully below, the Court should summarily deny Freemantle's Motion as a frivolous filing with a wholly improper objective.

## FACTUAL BACKGROUND

The County filed the above-captioned action on November 13, 2009 ("County's Lawsuit") asserting eleven (11) claims seeking rescission of a severance agreement ("Severance Agreement") executed between Anderson County and Preston. Three (3) days later, on November 16, 2009, Freemantle filed a lawsuit ("Freemantle Lawsuit") styled as a class-action asserting claims for damages and declaratory relief. (*See* Freemantle Motion, Ex.

A.) The Freemantle Lawsuit, like the County's Lawsuit, asserted claims relating to the Severance Agreement, although Freemantle's claims differed from that of the County.

On January 19, 2010, Preston and four (4) other defendants in the Freemantle Lawsuit respectively filed Motions to Dismiss (treated collectively as "January 2010 Motion"). In material part, the January 2010 Motion sought dismissal of the Freemantle Lawsuit on grounds that it sought substantially similar relief to that of the County's Lawsuit. (*See* Davis Aff. Attach. Exhibit A, 1/19/2010 Motion (hereinafter "Exhibit A.") The Circuit Court granted the January 2010 Motion, also finding a number of other defects in Freemantle's claims including a lack of standing. Freemantle appealed and the Supreme Court of South Carolina affirmed the dismissal, in part, and reversed the lower court's ruling as it related to Rule 12(b)(8) grounds and Freemantle's ability to pursue claims for alleged violations of the Freedom of Information Act ("FOIA").

The County's Lawsuit progressed and went to trial at the end of October of 2012. The Parties submitted written closings within a few weeks after trial. The Court issued its ruling on May 3, 2013. The County filed a Motion to Reconsider on May 13, 2013. And, Preston interposed a memorandum in opposition on July 16, 2013. In the meantime, after first learning of the County's Lawsuit over three and a half years before, Freemantle filed a Motion to Intervene into the County's Lawsuit on June 28, 2013. Then, Freemantle failed to serve the Motion on either the County or Preston until July 22, 2013. Preston files the instant Memorandum Opposing Freemantle's Motion.

## LEGAL STANDARD

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." *Sauner v. Public Service Authority of S.C.*, 354

S.C. 397, 411, 581 S.E.2d 161, 169 (2003); *see also S.C. Tax Commission v. Union City Treasurer,* 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct.App. 1998). Rule 24, SCRCP governs the intervention of non-parties under two possible scenarios: of right and permissively under the Rule. But, regardless of whether of right or permissively, under "Rule 24, SCRCP, a party may intervene only upon timely application." *State v. ex rel. Wilson*, 391 S.C. 565, 580, 707 S.E.2d 402, 410 (2011).

South Carolina Courts utilize a "four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial." *Id.* at 410; *see also Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991). When applied to the case *sub judice*, Freemantle's Motion proves manifestly untimely and the Court should deny the same.

If a putative intervenor satisfies Rule 24's timely application requirement, which Freemantle plainly cannot do, he must then still satisfy the appropriateness of intervention by right or permissively as set forth in subparts (a) and (b) of Rule 24 respectively. To establish intervention by right, Freemantle must show either: (1) "a statute confers [upon him] an unconditional right to intervene;" or (2) Freemantle "claims an interest to the property or transaction" and "the disposition of the action may as a practical matter impair or impede his ability to protect that interest" and the County will not adequately protect any interest Freemantle may have. Rule 24(a), SCRCP. "Intervention of right requires a direct, substantial, legally protectable interest in the proceedings." *Ex parte Reichlyn*: *In*

*re: SCDHEC v. Columbia Organic Chemical Co., Inc.*, 310 S.C. 495, 499, 427 S.E.2d 661, 664 (1993).

Rule 24(b), SCRCP, by contrast, sets forth the standard for permissive intervention. A party "may be permitted to intervene" when (1) "a statute confers a conditional right to intervene;" or (2) "when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b), SCRCP. "To warrant intervention under Rule 24(b) an applicant should ordinarily show he is charged with a public duty requiring him to intervene or has a claim or defense involving a question of law or fact in common with the main action." *S.C. Tax. Commission v. Union City Treasurer*, 295 S.C. at 262; 368 S.E.2d at 75. In addition, "a hearing is not required" on a motion to intervene, where as here, "it is clear from the face of the application that the motion must be denied." 7C Wright and Miller, §1914. Applying the foregoing standards, Freemantle's Motion altogether lacks merit.

## LAW/ANALYSIS

Freemantle's Motion fails for the following reasons:

### I. FREEMANTLE FAILED TO FILE HIS MOTION IN A TIMELY MANNER.

The Court should deny Freemantle's Motion as untimely. Applying the factors used by South Carolina Courts to evaluate the timeliness of intervention motions, Freemantle fails all four (4) criteria. Accordingly, the Court should deny Freemantle's Motion as devoid of merit.

### A. Freemantle Waited Over Three (3) Years and Until the Parties Filed Post-Judgment Submittals Before Pursuing His Now, Untimely Motion to Intervene.

The Court record confirms beyond contest that Freemantle knew of the County's Lawsuit for over forty (40) months before filing the instant Motion. On January 29, 2010, Preston and four of the individually named Defendants from the Freemantle Lawsuit filed Motions to Dismiss bottomed, in part, on Rule 12(b)(8), SCRCP. *See* Rule 12(b)(8), SCRCP (Providing for dismissal when "Another action is pending between the same parties for the same claim."); *see also* Exhibit A, ¶1 ("The case of *Anderson County v. Joey Preston and the South Carolina Retirement System*, C.A. No. 2009-CP-04-4482, which is pending in the Anderson County Court of Common Pleas, seeks the same or similar relief sought by Plaintiff as a taxpayer of Anderson County thereby barring this action under Rule 12(b)(8), SCRCP.") Yet, Freemantle took no action to intervene in the instant lawsuit. Nor could he as intervention was, and remains, wholly improper.[2]

Importantly, as of January 19, 2010, the pleadings in the County's Lawsuit had not closed. Preston had filed a motion to dismiss and the matter remained pending before the Court. Similarly, no discovery had commenced. The Court had not yet heard any motions. The case, in fact, remained in its infancy. Having full knowledge of the County Lawsuit, Freemantle took no steps to intervene, nor would he for another three and a half years, even though he could have sought intervention—in January of 2010—without any party incurring prejudice.

Several results flow from Freemantle's knowledge of the January 2010 Motion. First, Freemantle has known since that time that the County sought to rescind Preston's Severance Agreement. To the extent Freemantle could even assert an interest in the instant lawsuit, as he

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[2] Then, Freemantle briefed issues regarding Rule 12(b)(8), SCRCP in an ensuing appeal. *See Freemantle v. Preston et al.*, 398 S.C. 186, 192 (2012).

purports to do (but does not as explained *infra*), he knew of such "overlapping" interests since January 2010 and did nothing. And, to the extent intervention was somehow proper, which it plainly is not, Freemantle could have moved to intervene at any point *before now* for a period of forty (40) months. Freemantle instead did nothing.

**B. No Basis Justifies Freemantle's Extraordinary Delay.**

Simply no basis justifies Freemantle's delay in filing a motion for intervention. Nor does Freemantle's motion supply any *bona fide* reason or evidentiary basis supporting the delay. The County's Lawsuit remains almost identical in nature as it did four (4) years ago.

Indeed, neither the law nor facts at issue in the County's Lawsuit have materially changed, from Freemantle's standpoint.[3] Had Freemantle truly believed he possessed an interest in the instant litigation, he could have and should have moved to intervene before the actual parties conducted discovery for three (3) years, participated in countless hearings, and tried the case for six (6) days. To make matters worse, Freemantle and his counsel attended a number of the hearings in the County's Lawsuit and Freemantle's counsel even once appeared in the gallery during the actual trial. If Freemantle desired to intervene, he should have pursued such intervention long before now. No justification supports Freemantle's delay.

**C. The County's Lawsuit Now Exists at the Post-Judgment Stage.**

As noted above, the County's Lawsuit now exists at the post-judgment stage. Trial occurred roughly eight (8) months before Freemantle even filed his Motion. Then, Freemantle waited nearly an additional sixty days after the Court issued its ruling on May 3, 2013 before filing his Motion. And then, Freemantle withheld the Motion for another three (3) weeks

[3] The only possible difference related to the County's assertion of additional claims involving 2008 Council-member, Bill McAbee, but those additions did not change the County's theory of the case or basis for the relief it sought.

before bothering to serve the Parties in the case in which he seeks to intervene. Such facts only evidence Freemantle's ulterior motive in filing the Motion.

**D. Unacceptable Prejudice Would Result By Allowing Freemantle to Intervene Forty (40) Months After Learning About the Lawsuit and Eight (8) Months After Trial.**

"The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Wright & Miller, §1916. Preston would incur substantial prejudice by allowing Freemantle's untimely intervention. As referenced above, the Parties conducted discovery for three (3) years before the trial of this case in October/November of 2012. (Davis Aff., ¶23.)[4] Not including electronic production, over ten thousand (10,000) documents were exchanged and reviewed by the Parties. (*Id.* at ¶¶23 & 24.) The Parties prepared for and attended twenty-one (21) depositions. (*Id.* at ¶25.) The Parties participated in a number of hearings regarding discovery disputes. (*Id.* at ¶27.) In one such hearing, counsel for Freemantle appeared on behalf of another client. (*Id.* at ¶28.)

The Parties submitted lengthy memoranda in support of and opposing summary judgment motions. (*Id.* at ¶30.) The Parties argued pre-trial evidentiary motions. (*Id.* at ¶31.) Trial preparation consumed several hundred hours of attorney and paralegal time. (*Id.* at 32.) Then, the Parties tried the case for six (6) days entering over two hundred (200) exhibits into the record. (*Id.* at ¶¶32 & 33.) After the trial, the Parties submitted lengthy post-trial memoranda. (*Id.* at ¶36.) The Parties then briefed several collateral issues after trial, including the impact of a subsequent appellate ruling. (*Id.* at ¶37.) After the Court

[4] The Affidavit of Lane Davis is incorporated herein by reference.

issued its ruling, the Parties filed lengthy submittals concerning the County's Motion to Reconsider. (*Id.* at ¶38.)

To permit Freemantle's post-judgment intervention, then, would highly prejudice Preston. (*Id.* at ¶¶40 & 41.) As an initial matter, Freemantle's sole remaining claims, as asserted in the Freemantle Lawsuit, relate to alleged violations of the Freedom of Information Act ("FOIA"). The County has asserted no claims relating to FOIA violations in the case at bar. (*Id.* at ¶45.)

To interject FOIA claims in the instant lawsuit would prove wholly improper. In the case *sub judice*, Preston conducted no discovery regarding Freemantle's FOIA claims. For Freemantle to interject such claims into the instant lawsuit—after judgment—would unfairly and improperly deprive Preston of the right to defend himself regarding claims never alleged by the County.

Moreover, had such claims been asserted in the case at bar, Preston would *inter alia* have: asserted additional affirmative defenses, pursued additional and different discovery, pursued different trial strategies, and presented different trial evidence. (*Id.* at ¶40.) In short, Freemantle seeks to alter the complexion of the County's Lawsuit into something it was not. Such efforts would deprive Preston of a defense and violate his right to confrontation as secured by the state and federal constitutions. Or, alternatively, inclusion of such claims would require Preston to incur significant expense re-litigating a case already tried by the Court. (*Id.* at ¶40.) Freemantle's Motion is, therefore, legally without basis and the Court should summarily reject the same.

## II. FREEMANTLE'S MOTION TO INTERVENE SUFFERS FROM FACIAL DEFECT.

Freemantle's Motion to Intervene suffers from facial defect for three reasons:

### A. Freemantle's Motion Fails to Attach a Proposed Pleading.

Rule 24(c), SCRCP required, but Freemantle did not, attach a proposed "pleading setting forth the claim or defense for which intervention is sought." Rule 24(c), SCRCP. "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor." *Dillard v. City of Foley,* 166 F.R.D. 503, 506 (M.D. Ala. 1996) (Denying motion to intervene for purposes of pursuing an appeal of Court Order due to ninety (90) day delay and failure to attach proposed pleading) (citing *WJA Realty Ltd. Partnership v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989).)[5] Freemantle altogether failed to attach a proposed pleading thereby requiring the denial of his Motion due to facial defect. *Id.* ("Lastly, the court must deny the proposed intervention on the basis of a procedural defect in the proposed intervenors' application...In this case, the proposed intervenors did not submit a separate pleading with their" Motion to Intervene.)[6]

Absent a proposed pleading from Freemantle, and absent any particularity in Freemantle's Motion, Preston cannot discern what Freemantle purports to assert in the County's Lawsuit, whether he seeks to intervene as a matter of right, permissively, or both,

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[5] SCRCP 24 is materially the same as Federal Rule 24. *Davis v. Jennings*, 304 S.C. at 503; *see also Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330 (1991) ("Since [South Carolina's] Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.") (citing H. Lightsey & J. Flanagan, South Carolina Civil Procedure, (2d ed. 1985).)

[6] Freemantle does attach the Complaint from his prior lawsuit for reference purposes but obviously this would not satisfy his obligation to attach a proposed pleading in the County's Lawsuit.

whether he asserts claims against both Preston or the County, whether he asserts claims at all, whether he proposed to intervene as a Plaintiff or Defendant, and what relief he purports to assert. Even if Freemantle could properly support a Motion to Intervene, which he cannot, and even if the Court were inclined to grant the same, the Court would be compelled to deny the same as Freemantle failed to attach a proposed pleading to his Motion. Accordingly, the Court should deny Freemantle's Motion.

**B. Freemantle's Motion Violates Rule 7(b), SCRCP.**

Freemantle's Motion proves facially defective for a second reason. The Motion violates Rule 7(b), SCRCP ("Rule 7(b)"). Rule 7(b) states a motion "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Rule 7(b), SCRCP; *see also Summer Place of Myrtle Beach v. Knight*, 298 S.C. 241, 243, 379 S.E.2d 724, 725 (Ct.App. 1989). Here, Freemantle's Motion altogether lacks sufficient particularity to satisfy Rule 7(b), SCRCP.

Freemantle's Motion fails to contain even basic contentions supporting the same. Such failures *inter alia* include:

- Freemantle failed to specify whether he sought to intervene as a matter of right or permissively.
- Freemantle failed to specify what claims he sought to assert against what party.
- Freemantle failed to specify what relief he sought.
- Freemantle failed to specify what personal interests he possessed relating to Preston's Severance Agreement.
- Freemantle failed to specify how the disposition of the County's action would impair or impede his ability to protect his interests as related to his FOIA claims.

- Freemantle failed to specify what questions of law and fact are in common between his exclusively FOIA-based claims and the County's non-FOIA-based claims.

- Freemantle failed to specify whether he sought to intervene as Plaintiff or Defendant.

- Freemantle failed to furnish a proposed pleading.

- Freemantle failed to specify what remedies may be "adversely" affected that he is seeking in the Freemantle case.

- Freemantle failed to state any facts supporting his contentions regarding settlement efforts.[7]

- Freemantle failed to identify how the County's efforts do not already protect the interests pertaining to the Severance Agreement.

- Freemantle fails to support his motion with any affidavit materials.

As further evidence of the lack of particularity supporting his Motion, Freemantle even purports to support his Motion on a Motion to Amend he has not even filed yet. (*See* Freemantle Mot., p. 3 ("Freemantle intends to move to amend his complaint in the Freemantle case to seek an Order that any monies paid to Defendant Joey Preston pursuant to the purported severance agreement be returned to Anderson County.")

Freemantle's failure to support his Motion with particularity substantially prejudices Preston. (Davis Aff., ¶¶42-44.) Freemantle failed to file his Motion for nearly three and a

[7] Moreover, even if true, to the extent Freemantle contends to know such information, his knowledge of such facts would only evidence a violation of Anderson County Code. *See* ACC §2-288(a)(2) ("*Disclosure of confidential information.* No official or employee, shall, without proper legal authorization, disclose confidential information concerning the property, government or affairs of the county, nor shall he use such information to advance the financial or other private interests of himself or others.") In such an event, the doctrine of *ex turpi causa* would operate to bar Freemantle's intervention. *Jackson v. Bi-Lo Stores*, 313 S.C. 272, 276 (Ct. App. 1993) ("South Carolina courts have reached similar conclusions refusing to aid plaintiffs who are themselves guilty of an illegal act.")

half years after learning of the County's Lawsuit against Preston. Now post-judgment, Freemantle seeks to intervene in the County's Lawsuit without identifying any of the particulars of the Motion. Preston now has to expend further resources responding to a Motion—the basis of which cannot be ascertained even after review. Preston cannot adequately defend himself against a moving target, nor should he have to at such a late stage in the proceedings. Freemantle will presumably attempt to correct the deficiencies of his Motion, which Preston will then have to expend even more resources responding to Freemantle's subsequent position. Such moving target litigation violates the South Carolina Rules of Civil Procedure. Accordingly, the Court should deny Freemantle's Motion as failing to satisfy Rule 7(b), SCRCP.

**C. Freemantle's Motion Violates Rule 11(a), SCRCP.**

Freemantle's Motion likewise violates Rule 11(a), SCRCP. Rule 11(a) requires movant's counsel to attempt resolve the matter contained in the motion, "unless movant's counsel certifies that consultation would serve no useful purpose." Rule 11(a), SCRCP. Freemantle's Motion contains no certification and Freemantle's counsel never endeavored to resolve the motion in advance of filing. (Davis Aff. ¶44.) While Rule 11(a) does expressly exempt certain motions from consultation requirements, intervention motions do not fall within the exceptions. *See* Rule 11(a), SCRCP ("There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Rule 21, or in real estate foreclosure cases, or with *pro*

*se* litigants.") "The penalty for [Freemantle's] noncompliance [with Rule 11(a)] is to strike the motion." *Jackson v. Speed*, 326 S.C. 289, 310, 486 S.E.2d 750, 761 (1997).[8]

## III. FREEMANTLE CANNOT OTHERWISE INTERVENE AS A MATTER OF RIGHT.

While Freemantle's Motion fails to specify, and while his failure to submit a proposed pleading otherwise fails to allow the Parties to discern the grounds supporting his Motion, no basis exists for Freemantle to intervene as a matter of right pursuant to Rule 24(a), SCRCP. Under the Rule 24(a)(1), SCRCP, no statute confers upon Freemantle "an unconditional right to intervene." Rule 24(a)(1), SCRCP. Notably, Freemantle's Motion cites none.

As to the second prong of Rule 24(a), Freemantle has not, and cannot, demonstrate any individualized interest arising out of the Severance Agreement executed by Anderson County and Preston. In fact, the South Carolina Supreme Court found the exact opposite. In *Freemantle v. Preston*, 398 S.C. 186, 193 (2012), the Supreme Court of South Carolina found Freemantle lacked standing to pursue any claims relating to Preston's Severance Agreement, other than those arising under FOIA. *Id.* In this regard, the Supreme Court found Freemantle had no interests relating to the Severance Agreement different than "all citizens and taxpayers of Anderson County." *Id.* at 193. For that reason, the Supreme Court affirmed the dismissal of all claims alleged by Freemantle except those arising under FOIA. *Id.*

Freemantle thus finds himself in an inescapable logic box. On one hand, in the case at bar, no FOIA claims exist. Thus, Freemantle seeks to intervene in the instant lawsuit based upon statutory rights arising under FOIA when the instant lawsuit involves no adjudication of such rights and claims.

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[8] Preston also believes Freemantle's Motion is otherwise frivolous and filed for improper purposes but will leave such issues to the Court for its own determination.

On the other hand, the South Carolina Supreme Court has clearly ruled Freemantle has no standing to pursue any other claims relating to the Severance Agreement. Under South Carolina law, only a party with standing *and* who constitutes the real party in interest can properly intervene in a lawsuit.[9] *See Bailey v. Bailey,* 312 S.C. 454, 458 (1994). In *Bailey*, two attorneys, who previously represented Ms. Bailey but were terminated by her, intervened into a divorce action for purposes of seeking to undo a settlement wherein their attorney's fees were compromised. On appeal, the Supreme Court found the attorneys' intervention proved improper both for want of standing and because the attorneys did not constitute real parties in interest in the matter. The *Bailey* Court held:

> To have standing, a party must have a personal stake in the subject matter of a lawsuit. In South Carolina, a party must also be the "real party in interest." A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action...We find that respondents' interest as claimants asserting a right to attorney fees is peripheral and not the real interest at stake. Therefore, we hold that respondents lack standing to intervene in appellants' lawsuit.

*Id.* (emphasis added) (internal citations omitted); *see also Id.* at 459 ("In view of our finding that the respondents were without standing to intervene, the resulting restraining order is

[9] This analysis further accords with the holding in *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301 (Ct.App. 2001). The *Beaufort* Court held:

> Rule 201, SCACR, provides that "only a party aggrieved by an order, judgment, or sentence may appeal." A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970); *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. *Id.* A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests.

*Id.* at 301.

rendered void."); Rule 17(a), SCRCP (Requiring: "Every action shall be prosecuted in the name of the real party in interest.") [10]

The analysis from *Bailey* controls here. According to his Motion, Freemantle seeks to intervene into the County's Lawsuit, in part, because: "In the Anderson County case, on information and belief, the Plaintiff Anderson County and the Defendant Joey Preston have been discussing settlement..." (Freemantle Mot., p. 3.) Yet, in *Freemantle v. Preston*, the Supreme Court found Freemantle lacked standing to assert claims relating to the Severance Agreement other than those alleged under FOIA. And, the doctrine of collateral estoppel bars Freemantle from re-litigating the standing and real party in interest issues. *Crosby v. Prysmian Communs. Cables & Sys. USA, LLC*, 397 S.C. 101, 109 (Ct. App. 2012). In turn, under *Bailey*, even if he had properly supported his Motion to demonstrate the potential of settlement between the County and Preston, which he failed to do, the existence of some contingent impact on Freemantle fails to confer standing or real party in interest status upon him in order to support intervention. *See Bailey v. Bailey*, 312 S.C. at 458.

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[10] Ample authority supports such analysis. *See, e.g., Environmental Defense v. Leavitt*, 329 F.Supp.2d 55 (D.C.D.C. 2004) ("Applicant for intervention as of right must establish standing by showing that it suffered an 'injury in fact.'"); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309 (6th Cir. 2005) (Party could not intervene to appeal negotiated settlement because it had no cognizable legal interest in the subject matter of the zoning litigation.); *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508 (11th Cir. 1996) (*cert denied*) (Interest in the collateral estoppel effect of an action, in which a party is not a party in interest to the transactions underlying the action, is not a sufficient interest in the action to support intervention as of right.); *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343 (9th Cir. 1977) (A person with a potential claim against a party in a class action has no right to intervene simply because the outcome of the suit may increase or decrease the collectability of his claim."); *In re Franklin Bank Secs. Litigation*, 92 F.R.D. 468 (D.C.N.Y. 1981) (Nonprofit group was not entitled to intervene as of right in an action brought by FDIC to challenge order of confidentiality relating to settlement, as it had no significantly protectable interest in the litigation.); *Liberty Mut. Ins. Co. v. Pacific Indem. Co.*, 76 F.R.D. 656 (D.C. PA. 1977) (Tort Plaintiff could not intervene in declaratory action relating to insurance coverage as plaintiff had not yet obtained a judgment.)

Accordingly, as to Freemantle's FOIA claims, the instant lawsuit has no bearing on such claims; as to Freemantle's purported claim to "take-over" for the County, he lacks standing to do so and fails to constitute the real party in interest as required by Rule 17, SCRCP.

Even if Freemantle could invoke his FOIA rights, which are in no way at issue in the case at bar, such "rights" otherwise prove entirely speculative and contingent. First, as Freemantle's Motion tacitly concedes (by virtue of his reference to an intent to amend), his underlying Complaint never actually asserted a claim for rescission. Second, Freemantle's Motion to intervene leap-frogs an actual determination of the merits, which he has not yet obtained and just assumes he will obtain. Yet, Freemantle overlooks a series of substantive defects fatal to his claims. Third, Freemantle's Motion overlooks the discretion of the Court in fashioning equitable relief under FOIA. S.C. Code §30-4-100 ("The Court may order equitable relief as it considers appropriate.")[11] Thus, even if the Court ruled in favor of Freemantle, the Court retains discretion in fashioning the equitable relief it deems proper.

Even if such "rights" were otherwise appropriate for consideration in this matter, which they plainly are not, they fail to support Freemantle's intervention. Such "rights" prove remote and impermissibly contingent upon a series of events that have not even happened and, from a legal standpoint, should not happen. South Carolina precedent has expressly disallowed similar attempts to intervene for purposes of preserving a possible, future remedy. *See Ex parte Reichlyn v. Columbia Organic Chem. Co.*, 310 S.C. 495, 498, 427 S.E.2d 661, 663

[11] Moreover, Freemantle cannot re-assert FOIA claims in the instant lawsuit, as such claims would prove time-barred under FOIA's one year statute of limitations. *See* S.C. Code Ann. §30-4-100 (Requiring action to commence "no later than one year following the date on which the alleged violation occurs.") And, to the extent Freemantle seeks to re-assert his FOIA claims in this action, such claims would violate Rule 12(b)(8), SCRCP.

(1993) (Merely claiming a general interest in a lawsuit so as to preserve remedy in another lawsuit is not a "direct or legally protectable interest" in the subject of the lawsuit in which intervention is sought) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989) (merely claiming an interest in a lawsuit to preserve potential indemnification rights fails to support intervention).[12]

Fourth, and as alluded to above, Freemantle's Motion altogether fails to support the contention that the County has failed to protect legal interests relating to the Severance Agreement. To the contrary, the County, to date, has expended well over double the amount of severance monies paid to Preston in its bid to rescind the Severance Agreement. Merely because Freemantle may have a "difference of opinion concerning the tactics with which litigation should be handled does not [render] inadequate the representation" of the County as to the interests embraced by the instant lawsuit. 7C Wright and Miller, §1909. And, contrary to Freemantle's suggestions, even a decision not to take an appeal falls within the County's discretion, not his, and would not render the representation inadequate. *See, e.g., Little Rock School Dist. v. North Little Rock School Dist.*, 378 F.3d 774 (8th Cir. 2004) ("We presume that the government entity adequately represents the public...It is not sufficient that the party seeking intervention merely disagrees with the litigation strategy or objectives of the party representing its interests...That the Bollen Group has asserted its interest with arguably greater fervor than has the state and would have made different procedural choices, including a decision to appeal, does not" change the analysis.); *Dekalb County v. Post Properties, Inc.*,

[12] *See also Washington Elec. Co-op, Inc. v. Massachusetts Mun. Wholesale. Elec. Co.*, 922 F.2d 92, 97 (2d. Cir 1990) (internal citations omitted)("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the rule"); *Donaldson v. United States*, 400 U.S. 517, 531 (1971)("The interest must be direct, substantial, and legally protectable.")(superseded by subsequent statutory enactment.)

263 S.E.2d 905, 909 (1980) ("[W]here the interest of the intervenor is identical to that of a governmental body or officer who is a named party, it will be assumed that the intervenor's interests are adequately represented, absent a "concrete showing of circumstances in the particular case that make the representation inadequate...Even a decision not to take an appeal" falls "within the discretion of the representative" body.).

The instant lawsuit was not brought by Freemantle. The claims asserted therein are not his. Contrary to his filing, Freemantle has no legal basis to act as a lawsuit overlord, who can, at his whim, *fiat* his uninvited presence into a lawsuit between two other parties.[13] Freemantle was required, but has not, made any showing how the County's pursuit of the instant lawsuit proves inadequate. His Motion, therefore, necessarily fails under Rule 24(a), SCRCP.

**IV. FREEMANTLE CANNOT PERMISSIVELY INTERVENE.**

Freemantle similarly fails to satisfy permissive intervention requirements. No statute affords Freemantle the "conditional right to intervene." Rule 24(b)(1), SCRCP. Freemantle notably cites none.

Freemantle similarly fails to satisfy Rule 24(b)(2), SCRCP. No "claim or defense" of Freemantle involves a "common" "question of law or fact" with the instant action. Rule 24(b)(2), SCRCP. As noted *supra*, the County has alleged no claims arising under FOIA in this case. No legal issues, then, overlap with the sole remaining claims in the Freemantle Lawsuit. Of course, Freemantle's Motion fails to discharge its burden by identifying what legal issues overlap because none exist. From a factual standpoint, the converse also proves true. That is, no fact necessary to prove the County's claims for relief overlap with the claims

[13] Freemantle ran for County Council but proved unsuccessful. He has no legal right to strip the decision-making of an elected body and make it his own.

asserted by Freemantle. Accordingly, Freemantle failed to satisfy the second prong of Rule 24(b)(2) and the Court should, in short order, deny his Motion as wholly unsupported and improper.

Finally, for the reasons stated above, Freemantle's Motion impermissibly prejudices Preston and should be denied on that ground alone. "In exercising its discretion," Rule 24 requires the Court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b)(2), SCRCP. Here, Freemantle's Motion, in fact, will unduly delay the adjudication of the instant case and will prejudice Preston. Accordingly, the Court should deny Freemantle's Motion.

## CONCLUSION

Freemantle waited nearly three and half years to pursue the instant Motion. Now, after the *actual* Parties have finished all discovery, significant motions practice, the actual trial, and post-trial motions, Freemantle has decided he would like to "jump into" the case at bar. To make matters worse, his Motion comes nowhere near setting forth the grounds required for doing so. For the reasons set forth above, Freemantle's Motion has no merit and the Court should deny the same.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Joey Preston

Greenville, South Carolina

July 23, 2013

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF ANDERSON | ) | Civil Action No. 2009-CP-04-4482 |
| Anderson County, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | **AFFIDAVIT OF LANE W. DAVIS** |
| Joey Preston and the South Carolina Retirement System, | ) | |
| | ) | |
| Defendants. | ) | |

Personally appeared before me, the undersigned, who, being duly sworn, states as follows:

FILED-CLERK'S OFFICE
ANDERSON SC
2013 JUL 25 A 10:51
COMMON PLEAS AND
GENERAL SESSIONS

1. My name is Lane W. Davis.

2. I am over eighteen (18) years of age.

3. I am of sound mind and competent to execute this affidavit.

4. Unless otherwise indicated, the information contained in this affidavit is based upon personal knowledge.

5. Anderson County ("County") filed the above-captioned lawsuit ("County's Lawsuit") on November 13, 2009.

6. The County's Lawsuit asserted eleven (11) different causes of action against Preston.

7. Ten (10) of the County's claims sought rescission of the Severance Agreement ("Severance Agreement") executed by Preston and the County on November 18, 2008.

8. The remaining claim sought to impose a constructive trust.

A TRUE COPY
JUL 25 2013
CLERK OF COURT

9. Richard Freemantle ("Freemantle") filed a Motion to Intervene in the County's Lawsuit on June 28, 2013.

10. For whatever reason, Freemantle withheld service of the Motion until July 19, 2013, with actual delivery to Preston on July 23, 2013.

11. Court records reflect that Freemantle knew of the existence of the County's Lawsuit no later than January of 2010.

12. Freemantle filed his own lawsuit ("Freemantle Lawsuit") within three (3) days of the filing of the County's Complaint in this matter.

13. In response, Court filings reflect Preston and four (4) other Defendants respectively filed Motions to Dismiss on or about January 19, 2010.

14. In those Motions, attached hereto as **Exhibit A**, and incorporated herein by reference, the Defendants moved to dismiss, in part, stating:

> The case of *Anderson County v. Joey Preston and the South Carolina Retirement System,* C/A No. 2009-CP-04-4482, which is pending in the Anderson County Court of Common Pleas, seeks the same or similar relief sought by the Plaintiff as a taxpayer of Anderson County thereby barring this action under Rule 12(b)(8), SCRCP.

(Ex. A, p. 2.)

15. The Court subsequently issued an Amended Order (amendment believed to be prompted by an attempt by Freemantle to amend his Complaint to assert a RICO claim) on November 22, 2010.

16. A copy of the Amended Order is attached hereto as **Exhibit B** and incorporated herein by reference.

17. Beginning on page 16 and continuing on page 17 of the Order, the Court held:

> I find that Plaintiff would be further barred from pursuing the present action by Rule 12(b)(8) of the South Carolina Rules of Civil Procedure. Rule 12(b)(8) provides that an action should be dismissed if "another action is pending between the same parties for the same claim." In the present case, the Plaintiff names Joey Preston, Anderson County, and the individual Defendants, all as defendants in this case. The Plaintiff's Complaint seeks to undo the severance agreement granted by Anderson County to Joey Preston and to hold Preston, along with the individual defendants, liable to him personally for their votes in favor of the agreement. The case of Anderson County v. Joey Preston and the South Carolina Retirement System, which is pending in the Anderson County Court of Common Pleas, also seeks to revoke the severance agreement granted to Preston.

(Ex. B, pp. 16-17.)

18. Thereafter, Freemantle challenged this finding in *Freemantle v. Preston*, 398 S.C. 186 (2012).

19. As a consequence, Freemantle learned no later than January of 2010 that the County's Lawsuit existed and also sought similar relief regarding Preston's Severance Agreement.

20. Nonetheless, Freemantle failed to file his Motion for Intervention until June 28, 2013 and, even then, failed to serve the same until July 19, 2013.

21. The Court issued its ruling in the County's Lawsuit on May 3, 2013.

22. Before Freemantle served his Motion to Intervene, the County filed a Motion to Reconsider and Preston had responded to the same.

23. The County and Preston conducted discovery for over three (3) years in advance of trial. During such discovery, the Parties exchanged multiple rounds of written discovery and the production of over ten thousand pages (10,000) of documents.

24. Such production count does not include documents produced solely in electronic format.

25. Twenty-one (21) depositions were taken during the County's Lawsuit.

26. Several depositions lasted more than one day.

27. Multiple discovery disputes arose resulting in no less than three (3) lengthy discovery hearings.

28. During one hearing in the County's Lawsuit, counsel for Freemantle actually participated on behalf of another client (WAIM Radio and radio personality Rick Driver).

29. In the County's Lawsuit, the Parties prepared and submitted lengthy status reports to the Court.

30. The Parties also drafted and submitted lengthy memoranda supporting cross-motions for summary judgment.

31. The Court conducted lengthy hearings on Summary Judgment Motions, spanning two different days of court. In addition, the Court conducted hearings on numerous pre-trial evidentiary motions.

32. The trial of the case lasted six (6) days. Trial preparation consumed several hundred hours of attorney and paralegal time.

33. The Parties entered over two hundred (200) exhibits into evidence. All such exhibits required review and analysis as to admissibility.

34. A number of witnesses were presented through deposition designations. The designations, counter-designations, and objections consumed significant amounts of time.

35. Several witnesses at trial were professionals including two attorneys and an economist. Such witnesses required substantial preparation time.

36. The Parties then submitted lengthy closings.

37. The Parties also submitted additional memoranda regarding post-trial issues.

38. Once the Court ruled, the Parties submitted filings in relation to the County's Motion to Reconsider.

39. Despite knowing of the County's Lawsuit since January of 2010, and despite repeatedly speaking on the topic during public meetings on numerous occasions, Freemantle did nothing to intervene in the County's Lawsuit and participated in none of the above-described activities.

40. Freemantle's Motion to Intervene substantially prejudices Preston for the following reasons:

- Freemantle's ability to assert new claims in the County's Lawsuit – after judgment – forecloses Preston's ability to defend against such claims.
- The assertion of new claims by Freemantle deprives Preston of the ability to conduct discovery into such claims. Or, alternatively, if discovery were re-opened, Preston would have to incur duplicative expense and effort re-conducting discovery he could have completed contemporaneously with prior discovery had Freemantle timely moved to intervene.
- The assertion of new claims deprives Preston of confrontation clause rights as to such claims, as he would be deprived of a trial and deprived of the right to cross-examine witnesses.
- Alternatively, the assertion of new claims would require Preston to re-try a lawsuit where a trial has already occurred at significant additional expense.
- The assertion of new claims deprives Preston of the right to assert affirmative defenses against such claims.
- Alternatively, the assertion of new claims would require Preston to assume the burden of proving affirmative defenses he could have already proved had Freemantle timely filed his motion.
- Had Freemantle successfully intervened earlier in the case, Preston would have pursued:

- A different discovery strategy;
- A different presentation of trial evidence;
- A different trial strategy;
- Would have made several different tactical decisions;
- And may have asserted counterclaims.

- In short, different claims would have resulted in a different case with different strategies. It prejudices Preston to allow Freemantle to undo the same after the Court issues judgment.

- Moreover, as to the strategies already pursued by Preston in relation to the County's actual case, Preston cannot put the genie, so to speak, back in the bottle.

41. Freemantle's intervention will also inevitably result in undue delay. Freemantle has not litigated the instant case, cannot possibly understand all of the legal underpinnings of the same, and will not be familiar with the evidence presented at trial or the Court's rulings about the same.

42. Freemantle's Motion to Intervene is likewise ambiguous to Preston's prejudice.

43. This is true for several reasons:

- It is impossible to discern what claims Freemantle seeks to assert;
- It is impossible to discern whether he seeks intervention of right or permissively;
- It is impossible to discern the grounds Freemantle bases his Motion on, whether under Rule 24(a) or Rule 24(b).
- It is impossible to discern what relief Freemantle seeks to assert;
- It is impossible to discern whether Freemantle seeks to join as a Plaintiff or Defendant in the County's Lawsuit;
- It is impossible to discern the basis why Freemantle contends the County cannot protect interests relating to the Severance Agreement;

- It is impossible to discern what "interests" Freemantle claims in the County's Lawsuit; and

- It is impossible to discern what common legal questions and issues of fact Freemantle contends exist.

44. Preston is prejudiced by the lack of particularity in Freemantle's Motion. This is true for several reasons:

- Freemantle's Motion failed to attach a proposed filing as required by Rule 24, SCRCP.

- Freemantle failed to consult with counsel for Preston before filing.

- Freemantle failed to attached a Certification to his Motion under Rule 11, SCRCP.

- Many of the issues involved with intervention motions require detailed, time-consuming analysis.

- Freemantle's lack of particularity forecloses Preston's ability to conduct such analysis.

- The lack of particularity requires Preston to incur the expense of duplicative effort. Preston has to incur the cost of an initial response only to interpose further response, if and when Freemantle files a correct motion.

- Freemantle's lack of particularity places Preston at an unfair disadvantage. By failing to support his Motion properly, Freemantle remains a "moving target." Freemantle will continue to revise his filings to avoid issues raised by Preston until the Court disallows such luxury. In the meantime, Preston incurs the expense of such improper filings.

- Freemantle's lack of particularity causes undue delay in a lawsuit that is already approaching four (4) years in age. Additional delay creates additional expense in a lawsuit where expense has already been used for tactical purposes.

45. None of the claims remaining in Freemantle's Lawsuit (i.e., FOIA claims) are at issue in the County's Lawsuit.

46. And, pursuant to the Supreme Court's holding in *Freemantle v. Preston, et al.*, Freemantle lacks standing to assert the claims alleged in the County's Lawsuit.

47. No showing has been made demonstrating the County cannot adequately protect its interests regarding the Severance Agreement.

48. And, meaning no disrespect to Mr. Griffin, it seems unlikely he will be able to learn the facts and law supporting the County's position better than the lawyers who have actively litigated those issues for nearly four (4) years.

FURTHER AFFIANT SAYETH NOT.

Lane W. Davis

Sworn to before me this 23rd
day of July, 2013.

Notary Public for South Carolina
My commission expires: 12-15-15

**EXHIBIT A**

MOTION FEE PAID

STATE OF SOUTH CAROLINA )
)
COUNTY OF ANDERSON )

IN THE COURT OF COMMON PLEAS

Richard Freemantle, individually and on behalf of himself and all others similarly situated,
☐ Plaintiff

v.

Joey Preston, et al.
☒ Defendant.

CASE NO.

2009-CP-04-4528

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| Charles R. Griffin, Bar No. 6489<br>Address:<br>136 North Main Street, Anderson, SC 29621<br>phone: (864) 231-8870 fax: (864) 231-7797<br>e-mail: other: | D. Randle Moody, Ii, Bar No. 14135<br>Address:<br>P.O. Box 10529, Greenville, SC 29203<br>phone: (864) 349-2600 fax: (864) 249-0303<br>e-mail: rmoody@roecassidy.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion toDimiss on behalf of Defendants Wilson, McAbee, Greer, Thompson & Floyd
Estimated Time Needed:30 minutes Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 19, 2010
Date submitted

A TRUE COPY
JAN 19 2010
CLERK OF COURT

**SECTION III: Motion Fee**

☐ PAID – AMOUNT:
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

**CLERK'S VERIFICATION**

Collected by: T. Garrett
Date Filed: 1-19-10

☑ MOTION FEE COLLECTED: 25.00
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

MOTION FEE PAID

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF ANDERSON<br><br>Richard Freemantle, individually and on behalf of himself and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>Joey Preston, in his official capacities and individually, while the Administrator of Anderson County; Anderson County, a political subdivision of the State of South Carolina; Anderson County Council, the legislative and executive body of Anderson County; Ron Wilson, in his official capacities and individually; Bill McAbee, in his official capacities and individually; Larry Greer, in his official capacities and individually; Michael Thompson, in his official capacities and individually; Grace Floyd, in her official capacities and individually,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No.: 2009-CP-04-4528<br><br>**MOTION TO DISMISS** |

A TRUE COPY
JAN 19 2010
CLERK OF COURT

## DEFENDANTS WILSON, MCABEE[1], GREER, THOMPSON, AND FLOYD'S MOTION TO DISMISS

YOU WILL PLEASE TAKE NOTICE that the above named Defendants, Wilson, McAbee, Greer, Thompson, and Floyd, by and through their undersigned counsel, hereby move the Court to dismiss the Plaintiff's Complaint pursuant to Rule 12(b)(6) and 12(b)(8) of the South Carolina Rules of Civil Procedure.

[1] Defendant Bill McAbee previously filed a Motion to Dismiss in this matter. McAbee joins in this Motion.

This motion is based upon the grounds that the Plaintiff's Complaint fails to state facts sufficient to pursue causes of action against Defendants and that the alleged causes of action so stated in said Complaint fail to state claims upon which relief can be granted.

The Plaintiff brings this action based upon taxpayer standing and seeks to assert a class action claim concerning the actions of the Anderson County Council in the County's agreement to a severance package with former County Administrator, Joey Preston. The Plaintiff seeks various injunctive and declaratory relief concerning the actions of the Anderson County Council and money damages from Defendants Wilson, McAbee, Greer, Thompson and Floyd, all of whom were duly elected members of the Anderson County Council who voted in favor of the subject severance package. The Defendants Wilson, McAbee, Greer, Thompson and Floyd seek dismissal of the Plaintiff's Complaint on the following grounds:

(1) The case of *Anderson County v. Joey Preston and the South Carolina Retirement System*, C/A No. 2009-CP-04-4482, which is pending in the Anderson County Court of Common Pleas, seeks the same or similar relief sought by the Plaintiff as a taxpayer of Anderson County thereby barring this action under Rule 12(b)(8), SCRCP.

(2) Plaintiff lacks constitutionally required standing as neither he nor the uncertified class members have suffered a particularized injury in fact, and therefore cannot pursue the causes of action in his Complaint against Defendants.

(3) The Plaintiff lacks standing as an individual to assert claims for damages against these Defendants.

(4) The Plaintiff lacks standing to seek injunctive or declaratory relief against these Defendants.

(5) As to the Plaintiff's putative class action claims, the Plaintiff fails to set forth the necessary elements to establish a class action under Rule 23, SCRCP.

(6) All allegations stated in the Plaintiff's Complaint involve alleged misconduct of entities and/or individuals and alleged damages resulting therefrom, for which Defendants are immune from liability under the provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*

(7) The Defendants have legislative immunity for all actions taken in their positions as duly elected members of Anderson County Council.

(8) Defendant Preston's Employment Contract, which contains a provision providing for a definite term of employment, with an option to renew said term at the discretion of the parties, was binding upon subsequent Anderson County Councils, authorized by enabling legislation, S.C. Code Ann. § 4-9-620; and Defendant Preston's Severance Agreement was and continues to be a validly executed and binding contractual agreement.

(9) Plaintiff's claims for violations of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq* (FOIA), must be dismissed as untimely pursuant to S.C. Code Ann. § 30-4-100(a) and/or because the allegations of the Complaint fail to state a claim for such violations.

(10) Plaintiff fails to allege that he and/or the members of the uncertified class suffered any special damages as a result of any alleged conspiracy. In so pleading, Plaintiff has failed to assert a necessary element of the civil conspiracy cause of action and therefore Plaintiff's civil conspiracy claim must be dismissed.

(11) Plaintiff's allegations challenge the manner in which policies and procedures of a legislative body were undertaken, and therefore said allegations constitute nonjusticable political questions and/or legislative action which is not subject to judicial review.

(12) Plaintiff cannot maintain the breach of fiduciary duty cause of action because Defendants' relationship with Plaintiff and/or the uncertified class members was not of a kind or nature that would impose fiduciary duties upon Defendants.

(13) Plaintiff's claim for injunctive and declaratory relief are not proper against these individual defendants, since individually, none of their actions are now or were in the past, binding on Anderson County.

(14) As to some or all of the Plaintiff's causes of action, the allegations do not rise to a private right of action.

(15) Plaintiff attempts to assert tort or common law causes of action for which a statute provides a remedy. As such, under *Lawson v. South Carolina Dept. of Corrections*, 340 S.C. 346, 532 S.E.2d 259 (2000) and *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992), such claims should be dismissed.

(16) The Plaintiff's claim for civil conspiracy is not proper since the individual defendants were acting in their role as members of the Anderson County Council.

This motion is based upon the pleadings filed in this case and any memoranda presented to the Court at the hearing.

Accordingly, based upon the forgoing, the above named Defendants, collectively request that Plaintiff's Complaint be dismissed with prejudice.

**(SIGNATURE PAGE TO FOLLOW)**

Respectfully Submitted,

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Joseph O. Smith, S.C. Bar # 77475
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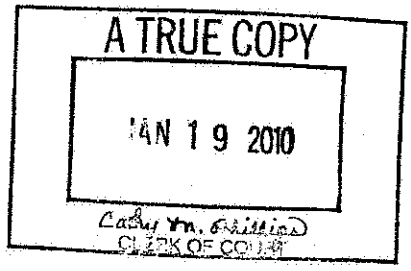
ATTORNEYS FOR DEFENDANTS WILSON, McABEE, GREER, THOMPSON AND FLOYD

January 19, 2010

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | ) | IN THE COURT OF COMMON PLEAS |
| | ) | CA. NO.: 2009-CP-04-4528 |
| Richard Freemantle, individually and On behalf of himself and all others Similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>Joey Preston, in His Official Capacities and Individually; While Administrator of Anderson County, Anderson County, a political Subdivision of the State of South Carolina; Anderson County Council, the Legislative and Executive Body of Anderson County, Ron Wilson, in His Official Capacities and Individually; Bill McAbee, in His Official Capacities and Individually; Larry Greer, in His Official Capacities and Individually; Michael Thompson, in His Official Capacities and Individually; Gracie Floyd, in Her Official Capacities and Individually<br><br>Defendants. | ) | **CERTIFICATE OF SERVICE** |




This is to certify that I did cause on this date a copy of the **Motion to Dismiss on behalf of Defendants Wilson, McAbee, Greer, Thompson and Floyd** to be served in the above-entitled matter on the person(s) listed below by enclosing a copy of same in an envelope with sufficient postage thereon prepaid in the United States mail, addressed as follows:

**Charles R. Griffin, Jr.**
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**Anderson, SC 29621**

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**The Allen Law Firm**
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**Anderson, SC 29622**

**William H. Davidson**
**Davidson, Morrison & Lindemann, PA**
**P.O. Box 8568**
**Columbia, SC 9202-8568**

**Candy Kern-Fuller**
**200 E Main Street**
**Easley, SC 29640**

**James W. Logan, Jr.**
**Logan Jolly & Smith, LLP**
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**Michael S. Pitts**
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**Greenville, SC 29603-0648**

**Kevin W. Sturm**
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**ROE CASSIDY COATES & PRICE, P.A.**

Ellen S. Griffin
Paralegal to D. Randle Moody, II
P.O. Box 10529
Greenville, SC 29603
(864) 349-2600

Greenville, South Carolina
January 19, 2010

**MOTION FEE PAID**

STATE OF SOUTH CAROLINA )
)
COUNTY OF ANDERSON )

IN THE COURT OF COMMON PLEAS

Richard Freemantle, individually and on behalf of himself and all others similarly situated,
☐ Plaintiff

v.

Joey Preston, et al.
☒ Defendant.

CASE NO.

2009-CP-04-4528

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| Charles R. Griffin, Bar No. 6489<br>Address:<br>136 North Main Street, Anderson, SC 29621<br>phone: (864) 231-8870 fax: (864) 231-7797<br>e-mail: other: | D. Randle Moody, II, Bar No. 14135<br>Address:<br>P.O. Box 10529, Greenville, SC 29203<br>phone: (864) 349-2600 fax: (864) 249-0303<br>e-mail: rmoody@roecassidy.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion toDimiss on behalf of Defendant Joey Preston
Estimated Time Needed:30 minutes Court Reporter Needed: ☒ YES / ☐ NO

A TRUE COPY
JAN 19 2010
Betty W. Phillips
CLERK OF COURT

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 19, 2010
Date submitted

**SECTION III: Motion Fee**

☐ PAID – AMOUNT:
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

**CLERK'S VERIFICATION**

Collected by: T. Garrett

Date Filed: 1-19-10

☑ MOTION FEE COLLECTED: 25.00
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

MOTION FEE PAID

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF ANDERSON<br><br>Richard Freemantle, individually and on behalf of himself and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>Joey Preston, in his official capacities and individually, while the Administrator of Anderson County; Anderson County, a political subdivision of the State of South Carolina; Anderson County Council, the legislative and executive body of Anderson County; Ron Wilson, in his official capacities and individually; Bill McAbee, in his official capacities and individually; Larry Greer, in his official capacities and individually; Michael Thompson, in his official capacities and individually; Grace Floyd, in her official capacities and individually,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No.: 2009-CP-04-4528<br><br>**MOTION TO DISMISS** |

A TRUE COPY
JAN 19 2010
Cathy M. Phillips
CLERK OF COURT

## DEFENDANT PRESTON'S MOTION TO DISMISS

YOU WILL PLEASE TAKE NOTICE that the Defendant, Joey Preston, by and through his undersigned counsel, hereby moves the Court to dismiss the Plaintiff's Complaint, as to this Defendant, pursuant to Rules 12(b)(6) and 12(b)(8) of the South Carolina Rules of Civil Procedure.

This motion is based upon the grounds that the Plaintiff's Complaint fails to state facts sufficient to pursue causes of action against this Defendant and that the alleged

causes of action so stated in said Complaint fail to state claims upon which relief can be granted.

The Defendant Preston would specifically show as follows:

(1) The case of *Anderson County v. Joey Preston and the South Carolina Retirement System*, C/A No. 2009-CP-04-4482, which is pending in the Anderson County Court of Common Pleas, seeks the same or similar relief sought by the Plaintiff as a taxpayer of Anderson County thereby barring this action under Rule 12(b)(8), SCRCP;

(2) Plaintiff lacks constitutionally required standing as neither he nor the uncertified class members have suffered a particularized injury in fact, and therefore cannot pursue the causes of action in his Complaint against Preston, or any other Defendant.

(3) The Plaintiff lacks standing as an individual to assert claims for damages against Preston.

(4) The Plaintiff lacks standing to seek injunctive or declaratory relief against Preston.

(5) As to the Plaintiff's putative class action claims, the Plaintiff fails to set forth the necessary elements to establish a class action under Rule 23, SCRCP.

(6) All allegations stated in the Plaintiff's Complaint involve alleged misconduct of entities and/or individuals and alleged damages resulting therefrom, for which Defendant Preston is immune from liability under the provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*

(7) Defendant Preston has immunity for all actions taken in his capacity as Anderson County Administrator.

(8) Defendant Preston's Employment Contract, which contains a provision providing for a definite term of employment, with an option to renew said term at the discretion of the parties, was binding upon subsequent Anderson County Councils; authorized by enabling legislation under S.C. Code Ann. § 4-9-620; and Defendant Preston's Severance Agreement was and continues to be a validly executed and binding contractual agreement.

(9) Plaintiff's claims for violations of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq* (FOIA), if such claims are alleged against this Defendant, must be dismissed as untimely pursuant to S.C. Code Ann. § 30-4-100(a) and/or because the allegations of the Complaint fail to state a claim for such violations. To the extent that this Court were to hold that any of the FOIA claims were timely, the FOIA claim pertaining to events occurring at Council meeting held November 18, 2008, where Defendant Preston was merely present, took no action during the meeting, and cannot be held liable for any alleged violation.

(10) Plaintiff fails to allege that he and/or the members of the uncertified class suffered any special damages and therefore Plaintiff cannot maintain the civil conspiracy cause of action.

(11) The Plaintiff's claim for civil conspiracy is not proper since the council member defendants were acting in their role as duly elected members of the Anderson County Council.

(12) Plaintiff's allegations challenge the manner in which policies and procedures of a legislative body were undertaken, and therefore said allegations

constitute nonjusticable political questions and/or legislative action which is not subject to judicial review.

(13) Plaintiff attempts to assert tort or common law causes of action for which a statute provides a remedy. As such, under *Lawson v. South Carolina Dept. of Corrections*, 340 S.C. 346, 532 S.E.2d 259 (2000) and *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992), such claims should be dismissed.

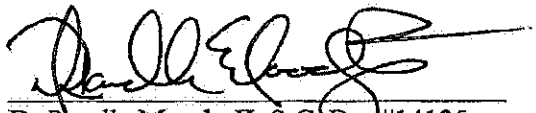
(14) Plaintiff cannot maintain his breach of fiduciary duty causes of action because Defendant's relationship with Plaintiff and/or the uncertified class members was not of a kind or nature that would impose fiduciary duties upon Defendant Preston.

(15) As to some or all of the Plaintiff's causes of action, Defendant Preston alleges that the allegations do not rise to a private right of action.

This motion is based upon the pleadings filed in this case and any memoranda presented to the Court at the hearing.

Accordingly, based upon the forgoing, Defendant Joey Preston, in his official capacity and individually, requests that Plaintiff's Complaint be dismissed with prejudice.

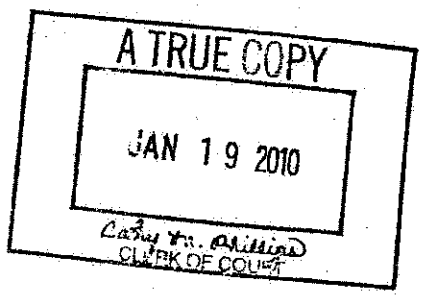
Respectfully Submitted,



D. Randle Moody II, S.C. Bar #14135
Joseph O. Smith, S.C. Bar # 77475
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
*Attorneys for Defendant Joey Preston*

January 19, 2010

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | ) | IN THE COURT OF COMMON PLEAS |
| | ) | CA. NO.: 2009-CP-04-4528 |
| Richard Freemantle, individually and On behalf of himself and all others Similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>Joey Preston, in His Official Capacities and Individually; While Administrator of Anderson County, Anderson County, a political Subdivision of the State of South Carolina; Anderson County Council, the Legislative and Executive Body of Anderson County, Ron Wilson, in His Official Capacities and Individually; Bill McAbee, in His Official Capacities and Individually; Larry Greer, in His Official Capacities and Individually; Michael Thompson, in His Official Capacities and Individually; Gracie Floyd, in Her Official Capacities and Individually<br><br>Defendants. | ) | **CERTIFICATE OF SERVICE** |




This is to certify that I did cause on this date a copy of the **Motion to Dismiss on behalf of Joey Preston** to be served in the above-entitled matter on the person(s) listed below by enclosing a copy of same in an envelope with sufficient postage thereon prepaid in the United States mail, addressed as follows:

**Charles R. Griffin, Jr.**
**136 North Main Street**
**Anderson, SC 29621**

**Donald C. Allen**
**The Allen Law Firm**
**P.O. Box 2861**
**Anderson, SC 29622**

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**P.O. Box 8568**
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P.O. Box 10529
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Greenville, South Carolina
January 19, 2010

**EXHIBIT B**

A TRUE COPY
NOV 22 2010
Martha B. Newton
CLERK OF COURTS

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON )

Richard Freemantle, individually and on behalf of himself and all others similarly situated,

Plaintiff,

v.

Joey Preston, in his official capacity and individually, while administrator of Anderson County,; Anderson County, a political subdivision of the state of South Carolina; Anderson County Council, the Legislative and Executive body of Anderson County; Ron Wilson, in his official capacity and individually; Bill McAbee, in his official capacity and individually; Larry Greer, in his official capacity and individually; Michael Thompson, in his official capacity and individually; Gracie Floyd, in her official capacity and individually,

Defendants.

Civil Action Number: 09-CP-04-4528

**AMENDED ORDER**

FILED-CLERK'S OFFICE
ANDERSON S.C.
2010 NOV 22 P 3:31
COMMON PLEAS AND
GENERAL SESSIONS

This matter comes before the Court upon numerous Motions to Dismiss filed by the Defendants in response to Plaintiff's Complaint and Amended Complaint. In response to Plaintiff's original Complaint filed on November 16, 2010, Defendants filed motions to dismiss which the Court consolidated and heard arguments on March 17, 2010. Plaintiff also filed an amended complaint on March 16, 2010 prompting Defendants to file additional motions to dismiss, which the Court consolidated and heard arguments on September 7, 2010. On September 28, 2010 the Court signed an Order dismissing Plaintiff's claims contained in the original Complaint based upon Plaintiff's lack of standing, among other things. This is an

Amended Order, again dismissing Plaintiff's original claims and those contained in the Amended Complaint for the reasons set forth below. The Plaintiff was represented by Charles R. Griffin, Jr., Esquire. The Defendants were represented as follows: D. Randle Moody, II, Esquire, and Joseph O. Smith, Esquire, of Roe, Cassidy, Coates & Price, P.A. for Defendants Preston, Wilson, McAbee, Greer, Thompson and Floyd; Kate A. Rice, Esquire, of Davidson & Lindemann, P.A. for Defendants Wilson, McAbee, Greer, Thompson and Floyd; Donald L. Chuck Allen, Esquire, of The Allen Law Firm for Defendant McAbee; Candy M. Kern-Fuller, Esquire, of Upstate Law Group, LLC for Defendants Preston, Greer, and Floyd; Kevin Sturm, Esquire, of Sturm & Cont, P.A. for Defendant Anderson County Council and James W. Logan, Jr., Esquire, of Logan, Jolly & Smith, LLC for Defendant Anderson County.

The Court has carefully considered all the evidence in the record, the memoranda filed by the parties, and the parties' arguments. Construing the facts in a light most favorable to the Plaintiff, for the reasons set forth below, Defendants' Motions to Dismiss are granted.

## I. FACTS AND PROCEDURAL BACKGROUND

The Plaintiff filed suit on November 16, 2009 against the above-named Defendants in their official and individual capacities, Joey Preston, the former County Administrator, individually and in his official capacity, Anderson County Council and Anderson County. During all times relevant to this action, the Defendants Wilson, McAbee, Greer, Thompson and Floyd were members of the Anderson County Council. This action arose from their votes in favor of a severance agreement between the County and Joey Preston. The Plaintiff alleges that the votes of the Defendant Council Members in favor of the severance agreement violated their fiduciary duties to the County and seeks to hold them personally liable for said votes. The Plaintiff also names Anderson County Council, Anderson County and Joey Preston and alleges various wrongs involving the severance agreement.

The Plaintiff further alleges that all of the Defendants violated the South Carolina Freedom of Information Act (*hereinafter* FOIA), S.C. Code Ann. § 30-4-10, *et seq.* and in Plaintiff's Amended Complaint he alleges that Defendants violated the federal Racketeer Influenced and Corrupt Organizations Act ( *hereinafter* RICO), 18 U.S.C. § 1961 *et seq.* Finally, the Plaintiff alleges that the various actions of each of these Defendants has damaged him as "a citizen, resident, taxpayer, and registered elector of Anderson County" and seeks money damages and declaratory judgment voiding the severance agreement between Anderson County Council and Preston, among other things.

The Defendants raise a number of issues in their Motions to Dismiss, including lack of standing and legislative immunity.

## II. APPLICABLE LAW AND ANALYSIS

### A. STANDING

A plaintiff must have standing to maintain an action. *Joytime Distrib. & Amusement Co., Inc., v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999); *See also Brock v. Bennett*, 313 S.C. 513, 443 S.E.2d 409 (S.C. App. 1994) (Standing is a fundamental requirement for instituting an action, and no justiciable controversy is presented unless the plaintiff has standing to maintain the action.). "Generally, a party must be a real party in interest to the litigation to have standing. A real party in interest is a party with a real, material, or substantial interest in the outcome of the litigation." *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)(internal citations omitted). Standing may be acquired: (1) by statute; (2) through the rubric of "constitutional standing"; or (3) under the "public importance" exception. *ATC South, Inc., v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008).

**(1) Constitutional Standing Requirements**

The principle of standing under the Constitution remains "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In South Carolina "[a] party seeking to establish standing must prove the irreducible constitutional minimum of standing...." *Sloan v. Greenville County*, 356 S.C. 531, 549, 590 S.E.2d 338, 348 (Ct. App. 2003). The United States Supreme Court has established a three-part test for evaluating whether the Plaintiff has established constitutional standing:

> First, the plaintiff must have suffered an "injury in fact"- an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly...trace[able] to the challenged action of the defendant, and not...the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Lujan*, 504 U.S. at 560-61.

An individual cannot maintain an action without establishing that they have personally suffered, or will likely suffer an injury that is particular as to them and not one inflicted upon the general public. An injury that is common to all does not provide adequate grounds for a plaintiff to maintain suit. In fact "[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury," and "a taxpayer lacks standing when he suffers in some indefinite way in common with people generally." *ATC South, Inc.*, 380 S.C. at 198, 669 S.E.2d at 341 (2008); *See Sloan v. Greenville County*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (S.C. App. 2003)(A taxpayer may not maintain an action against government officers when he or she has "no special interest and [their] only standing is the exceedingly small interest of a general taxpayer."); *Florence Morning News, Inc. v. Bldg. Comm'n of the City & County of Florence*, 265 S.C. 389, 398, 218 S.E.2d 881, 884-85 (1975)(A private citizen cannot test the validity of

legislative action unless he or she has sustained or will sustain some prejudice not common to the public from such action.).

The Plaintiff brought this action in his general capacity as "a citizen, resident, taxpayer, and registered elector of Anderson County, South Carolina." (Compl. ¶ 3). The only harms alleged by the Plaintiff are general in nature and shared equally by the public at large.[1] Therefore, without a showing of an injury particular to the Plaintiff that is not borne by the other taxpayers, citizens, residents, and registered electors of Anderson County, he cannot establish constitutional standing.

**(2) The Public Importance Exception**

The courts have carved out a public importance exception to the general standing rules that can confer standing upon a party that otherwise fails to meet the constitutionally required minimum threshold. *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005). The scope of the exception has and continues to be narrow, confined to those cases which involve issues of such public importance that their resolution is required for future guidance. *See Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005)(Concerning violations of statutory bidding requirements of state agencies.); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004)(Addressing legality of governor's eligibility for military service.); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)(Involving issuance of hospital bonds.). Narrowing the scope further, is the fact that this exception has been applied in declaratory judgment actions, not

[1] Under seven of the eleven causes of action Plaintiff has merely stated in a summarily general fashion that as a result of Defendants' actions "Plaintiff and members of the class have been damaged, both actual and punitive [sic], for which damages" some combination of Defendants are liable. (*See* Compl. ¶¶ 70, 77, 82, 87, 90, 93, 101). This does not include what could be deemed the 12th cause of action, "Class Action Allegations" under which no particular damage or injury is alleged. (*See* Compl. ¶¶ 128-32). Finally, in the Amended Complaint, Plaintiff summarily states that the Defendants' conduct allegedly in violation of RICO "has facilitated the taking of funds, property and/or cognizable property interests from Anderson County taxpayers, the Plaintiff, and the class." (*See* Amend. Compl. ¶ 131). This is again a broad conclusive statement which fails to identify any specific injury to the Plaintiff proximately caused by Defendants' alleged misdeeds.

in actions for money damages. *Id.*; *See also Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470(2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); ***Beaufort County v. Trask***, 349 S.C. 522, 563 S.E.2d 660 (Ct. App. 2002). As our State Supreme Court has recognized "[t]he key to the public importance analysis is whether a resolution is needed for future guidance, [and] it is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341.

***a. Resolution is not necessary for future guidance***

The Plaintiff's allegations do not raise issues of such public importance that judicial resolution would be needed for future guidance, calling for the application of the exception. On the contrary, any public impact resulting from the Court's resolution of the present matter would pale in comparison to the degree, breath, and longevity of the decisions in which the exception was utilized. Specifically, the South Carolina Supreme Court's decisions concerning how a state agency bids on construction jobs, whether the governor may serve in the military, and hospitals' issuance of bonds are all matters whose resolution have broad and continued effects on the public. State agencies will continue to bid on construction jobs, hospitals will issue bonds, and the State will continue to elect Governors who may want to serve in the military during their tenure. Plaintiff's action seeks to redress alleged injuries/wrongs flowing from an isolated event that he can prevent from happening in the future by voting to replace those he felt wronged the taxpayers of Anderson County. The Court also finds it telling that he seeks monetary damages in addition to declaratory relief, an action contrary to Plaintiff's position. The public importance exception has been applied only when the Plaintiff sought declaratory relief, as such relief in those cases conferred a benefit on the public at large. Plaintiff's recovery of monetary damages

would benefit him and him alone. The public importance exception should not be utilized in a manner contrary to its name and spirit. Courts have, and should, rarely apply this narrow exception to the constitutional mandates flowing from Article III.

***b. Judiciary is not "super-personnel" department***

The Plaintiff's suit involves the methods by which a personnel matter was investigated and ultimately decided upon by the Anderson County Council. The Plaintiff challenges the legality of the individual Defendants' (Wilson, McAbee, Greer, Thompson, and Floyd) votes in favor of a severance package to Joey Preston, the former County Administrator. There is no authority for granting standing under the public importance exception to a plaintiff bringing suit concerning the government's handling of a personnel matter. *See South Carolina Educ. Ass'n v. Campbell,* 883 F.3d 1251 (4th Cir. 1989). In fact, our courts discourage such judicial oversight. For example, in dealing with Title VII claims, the Fourth Circuit courts, including the South Carolina District Courts, routinely note that courts are not super-personnel departments. *See Thompson v. S. Carolina Dept. of Corr.*, 3:06-1020-JFA-JRM, 2007 WL 1726530 (D.S.C. June 14, 2007). It is not the province of the judicial system to weigh the prudence of employment decisions. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005); *See also Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000).

In the present action, the Plaintiff is essentially asking the Court to convey him standing in order to allow judicial oversight of the County's personnel decision. No "future guidance" can be gleaned from a court order finding that Defendants' actions were somehow improper. Therefore judicial resolution of the Plaintiff's allegations fails to rise to a level of public importance that would justify application of the standing exception. The proper forum for resolution of the Plaintiff's grievances lies in the voting booth, not the court house.

I find that the Plaintiff lacks standing to assert the claims set forth in his original Complaint against the Defendants. The only injuries alleged by the Plaintiff are in his capacity as a citizen, resident, taxpayer and registered elector of Anderson County. I find that under the facts as they are alleged and taken in the light most favorable to the Plaintiff, the Plaintiff fails to demonstrate that this matter is of such public importance as to warrant application of the public importance exception to grant him standing. Moreover, the Plaintiff's attempt to recover monetary damages derides against application of the exception and evidences the fact that the action is a much more private endeavor rather than one undertaken for the greater public good. I find no authority for granting public importance standing under circumstances where monetary damages are sought.

***c. Improper to proceed against Defendants in their individual capacity***

Even if this Court were to confer taxpayer standing to the Plaintiff, it would still not allow Freemantle to proceed with a claim against Defendant Preston or the other individual Defendants in their individual capacity. The Plaintiff's Complaint challenges the County's action in entering into a contractual relationship with the former County administrator. The Plaintiff asks that the contract be declared void due to the manner in which Preston and the other individual Defendants allegedly entered into the agreements. However, none of the individual defendants had the power to enter into a contract on behalf of the County as individual council members. Rather, the Council Members had to act collectively as the Anderson County Council, not as individuals. Notably, the taxpayer standing cases from South Carolina do not involve individual legislators. The Plaintiffs in those cases challenged the actions of the entities or government officials in their official capacities. See *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (S.C. App. 2003); ***Beaufort***

*County v. Trask*, 349 S.C. 522, 563 S.E.2d 660 (S.C. App. 2002); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). Here, the Plaintiff seeks redress from Preston and the other Defendants in their individual capacities. There is simply no authority for this. The proper defendant for any taxpayer challenge would be the County, not the individual defendants.

**(3) Statutory Standing – Freedom of Information Act Cause of Action**

As to the Plaintiff's claims falling under the Freedom of Information Act, I find that the Plaintiff also lacks standing as to these claims.[2] The only injury alleged is that of a general taxpayer, resident, citizen, and elector of Anderson County. The Plaintiff fails to allege any specific injury directly or proximately caused by Defendants' alleged FOIA violations. As stated above, I find that the Plaintiff's claims do not fall within the public importance exception to the standing rules. The Plaintiff has not alleged a compensable injury and lacks standing to proceed. These claims are also dismissed.

**(4) Asserted Class Action**

The Plaintiff seeks to assert a class action presumably on behalf of "all others similarly situated" as himself. (Compl. ¶ 1). Rule 23 of the South Carolina Rules of Civil Procedure establishes the prerequisites for a plaintiff seeking to bring a class action. Before a class can be certified, a court must find that (1) the class is so numerous that joinder of all parties is

[2] South Carolina Freedom of Information Act (FOIA) allows any citizen to bring a cause of action for violations of the statute. S.C. Code Ann. § 30-4-100. Plaintiff failed to assert standing upon this statutory ground; however even if he had done so, he would be precluded from pursuing this action under Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as discussed *infra*. Despite this definitive preclusion, if Plaintiff were allowed to proceed by being afforded standing upon this statutory basis, the permissible scope of his action would be greatly limited. Specifically, the applicable one year statute of limitations would prevent him from asserting all but one of the alleged FOIA violations contained in his Complaint, as the actions underlying the other FOIA claims happened more than a year prior to the commencement of the action. S.C. Code Ann. § 30-4-100(a). Furthermore, his remedies would be limited to those provided by the statute. *Lawson v. South Carolina Dep't of Corr.*, 340 S.C. 340, 532 S.E.2d 259 (2000); *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992)("[W]hen a statute creates a substantive right...and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy."). Therefore Plaintiff could seek declaratory and/or injunctive relief, not monetary damages. S.C. Code Ann. § 30-4-100.

impracticable; (2) there are questions of law or fact in common to the class; (3) the claims or defenses of the representative parties are typical to those of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the amount in controversy exceeds one hundred dollars for each member of the class. S.C. R. Civ. P. 23; *King v. American Gen. Finance Inc.*, 386 S.C. 82, 687 S.E.2d 321 (2009); *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (S.C. App. 2003); *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (S.C. App. 1986).

The Plaintiff has failed to set forth any evidence establishing the necessary prerequisites for class certification under Rule 23. In fact, the Plaintiff did not even attempt to define what group of individuals for whom he seeks to speak beyond the general description of "all those similarly situated" as himself. (Compl. ¶ 1). Without more information to identify the putative class, any class action claims cannot be permitted to proceed. Most importantly, before a class action suit can be certified, an individual or group must have standing to bring the action. *Owens v. Magill*, 308 S.C. 556, 419 S.E.2d 786 (1992). Plaintiff's lack of standing on his individual claims precludes him from proceeding with any putative class causes of action.

**B. PLAINTIFF'S AMENDED COMPLAINT**

**(1) RICO Cause of Action[3]**

***a. Public importance exception***

As to the Plaintiff's claims contained in the Amended Complaint concerning alleged violations of RICO, I find that if the Court were to rule upon the claims, the Plaintiff lacks standing to maintain these claims as well. The Plaintiff's claims and alleged injuries under the RICO cause

[3] Any claim contained in Plaintiff's Amended Complaint is not properly before the Court due to Plaintiff's failure to comply with Rule 15 of the South Carolina Rules of Civil Procedure which governs amendment of pleadings. *See infra*. Assuming arguendo that the Court would have granted Plaintiff leave to amend the Complaint, the RICO case of action would not be upheld and/or viable under the facts and circumstances of this case.

of action offer nothing which would confer standing and allow him to proceed as to this or any other cause of action. The addition of the RICO claim does not change the nature of the action in a manner which would somehow make the resolution of the case of such public importance as to confer standing under the exception. In essence the RICO cause of action primarily parrots the allegations contained in the original complaint and the Court's conclusion as to the application of the public importance exception remains unchanged.

In fact, the public importance exception to the constitutional standing requirements has not been recognized or utilized to confer standing in this context. A RICO claim is a federal cause of action which may be brought by "[a]ny person injured in his business or property by reason of a violation of section 1962...in any appropriate United States district court." 18 U.S.C. § 1962(c). The proper venue for Plaintiff's RICO claim lies in the district court which is bound by Art. III's "case and controversy" requirement. Therefore, the public importance exception has not been applied to confer plaintiffs standing to maintain RICO actions because to do so would violate the United States Constitution. Specifically, the exception has not been utilized to confer a party standing for a purely federal cause of action, such as a RICO claim, who otherwise lacks the constitutionally required elements as detailed in *Lujan*. *See supra* at 4. Therefore, maintenance of Plaintiff's RICO cause of action requires that he establish standing either by statute or through the traditional constitutional rubric detailed above. *ATC South, Inc., v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008).

***b. Constitutional standing***

As already noted, the Plaintiff has failed to allege a particularized "injury in fact" that is not suffered by the general public. Just as in the original Complaint, the Plaintiff's RICO claim merely alleges that he has suffered an injury which is common to the general public and impacts

him merely as a taxpayer, citizen, and registered voter of Anderson County. (*See* Amend. Compl. ¶¶ 130,131).[4] Specifically, Plaintiff alleges that he and the uncertified class suffered injury as a result of Defendants' alleged intimidation of Anderson County residents for the purpose of stifling public dissent, the utilization of county funds for interstate travel, and Defendants' other alleged actions Plaintiff claims to have violated the federal RICO statute. (Amend. Compl. ¶¶ 129-30). The Plaintiff has claimed a general injury resulting from Defendants' alleged violations of RICO which is suffered by the general public and the commonality of the alleged injury "defeats the constitutional requirement of a concrete and particularized injury." *ATC South, Inc., v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). Also, while Plaintiff's failure to establish the first element of constitutional standing, particularized injury in fact, is dispositive, he likewise fails to show that the alleged injuries would be redressed by a favorable decision of this Court. *See Lujan*, 504 U.S. at 560-61. Lacking any allegation or proof that he has suffered such an injury, and without the aid of the public importance exception, the only remaining avenue for Plaintiff to garner standing is via statute.

***c. Statutory Standing***

RICO allows "[a]ny person injured in his business or property by reason of a violation of section 1962...[to] sue therefor in any appropriate United States district court." 18 U.S.C.A. § 1962(c). Under the statute a "person" is "any individual or entity capable of holding legal or beneficial interest in property." 18 U.S.C.A. § 1961(3). In order to maintain a RICO action "plaintiffs must allege that Defendants' violations were a proximate cause of their injuries. *Sadighi v. Daghighfek*, 36 F. Supp. 2d 279, 286 (D.S.C. 1999); *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311 (1992). Here, as in *Sadighi*, Plaintiff has alleged

[4] The Court also believes it is worth noting that Plaintiff fails to plead for any specific damages under the RICO cause of action and the injuries alleged appear to be set forth by implication. *See* Amend. Compl. ¶¶ 128-134.

Defendants have engaged in conduct in violation of 18 U.S.C. §§ 1962(b), (c), and (d), and "[t]o have standing to assert private causes of action for these RICO violations, Plaintiffs must allege (1) violation of § 1962; and (2) injuries to their business or property that were proximately caused by these RICO violations." *Id*; *See also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985)("In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation" of RICO.).

The Plaintiff's Amended Complaint fails to allege that property in which he or the uncertified class holds a legal or beneficial interest and/or his or the uncertified class' business(es) have been damaged by the Defendants' actions which allegedly violated § 1962. The Amended Complaint states that "Plaintiff and the class have suffered injury as set forth above as required under 18 U.S.C. § 1964(c) based upon the defendants...prohibited activities in violation of 18 U.S.C. § 1962." (Amend. Compl. ¶ 130). What Plaintiff fails to do is establish the necessary causal nexus between the Defendants' activities alleged to have violated § 1962 and any damage or harm to his or the uncertified class' business or property. *See Sadighi* at 286 ("[P]roximate cause requires a nexus between the proscribed acts and the injuries."). Therefore, he cannot obtain standing to proceed via statute. Plaintiff has exhausted all available avenues by which he may obtain standing to proceed with his RICO claim, and accordingly his RICO cause of action, if it was properly before the Court, should be dismissed.

***d. Improper Venue***

Even if the Plaintiff could pursue his RICO cause of action, he seeks to do so in an inappropriate venue. 18 U.S.C.A. § 1964(a) confers jurisdiction to the District Courts of the United

States to hear claims for alleged RICO violations. This is not to say that state courts may never hear a civil RICO claim when considered in conjunction with viable state causes of action, however, without any surviving state causes of action, this Court may not obtain supplemental jurisdiction to hear Plaintiff's federal claim.

**(2) Rule 15 South Carolina Rules of Civil Procedure**

Plaintiff filed the original complaint on November 16, 2009. Defendants filed motions to dismiss on January 13, 15, and 19, 2010.[5] The Court scheduled oral arguments on the motion for March 17, 2010. The evening prior to oral arguments, on March 16, 2010 Plaintiff filed an Amended Complaint adding the RICO claim as an additional cause of action. Neither the parties nor the Court addressed the RICO claim at the March 17th hearing. Addressing the RICO claim at that time would have prejudiced Defendants as they did not have adequate notice and opportunity to address and refute the new claims, a disadvantage Rule 15 is designed to protect against. *See Collins Entertainment, Inc. v. White*, 363 S.C. 546, 611 S.E.2d 626 (S.C. App. 2005); *Parker*, 362 S.C. 276, 607 S.E.2d 711 (S.C. App. 2005); *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (S.C. 2000)( The prejudice envisioned by Rule 15 is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it.). Following the March 17th hearing, Defendants filed additional motions to dismiss, and the Court heard arguments on those motions on September 7, 2010.

Rule 15 provides that:

> A party may amend his pleadings once as a matter of course at any time before or within 30 days after a responsive pleading is served or...if the action has not been place on the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party.

[5] Anderson County filed a motion to dismiss on January 13, 2010, Anderson County Council filed a motion to dismiss on January 15, 2010, and the remaining Defendants filed a motion to dismiss on January 19, 2010.

S.C. R. Civ. Pro. 15. The Plaintiff contends that his amendment was within the time allowed under Rule 15 because Defendants' motions to dismiss were "responsive pleadings" and therefore their filing extended the timeframe in which he could amend his complaint. Under Plaintiff's theory, the deadline for amending a complaint re-sets each time a motion to dismiss, or presumably any other motion related to the complaint, is filed. Acceptance of Plaintiff's position would hinder the judicial process and is contrary to the spirit, purpose, and language of the Rules of Civil Procedure. However, even assuming Plaintiff is correct Defendants filed and served their motions to dismiss on January 19, 2010 which, under Plaintiff's theory, would make the latest permissible date to amend February 19, 2010. Plaintiff's attempted amendment was too late even under his incorrect interpretation of the Rule.[6]

Rule 15 is clear that the time for amendment starts to run when a responsive pleading is served. In the present case no responsive pleadings were filed, but rather Defendants responded to the complaint by filing motions to dismiss. These filings were not "responsive pleadings" as Rule 7(a) pertaining to pleadings makes clear by including "a complaint...an answer...a reply to a counterclaim...an answer to a cross-claim...a third party complaint [and] a third-party answer." S.C. R. Civ. P. 7(a).

At the time Plaintiff attempted to amend his complaint the trial was on the roster and therefore his only options for adherence to Rule 15 was to either obtain leave of the court or Defendants' consent to amend. Plaintiff failed to do either and therefore his amendment was impermissible under Rule 15.

[6] Defendants' motions filed after the March 17th hearing were in response to the new cause of action in Plaintiff's amended complaint and cannot be utilized, as Plaintiff appears to argue, to retroactively toll the timeframe in which the complaint may be amended.

## C. LEGISLATIVE IMMUNITY

While the ruling of standing is dispositive of the issues raised in the various Motions to Dismiss, I also find that had I reached the issue, I would have granted legislative immunity to Defendants Wilson, McAbee, Greer, Thompson and Floyd. South Carolina has long honored the public policy of recognizing "an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 342 (1979). There is no duty more essential to the position of a County Council member than voting. It is a long standing principle throughout this nation that judicial inquiries into legislative motivation should be avoided. *Fletcher v. Peck*, 10 U.S. 87 (1810). Each of these individual Defendants were a member of the Anderson County Council which voted in favor of the severance agreement at issue in this case. The Plaintiff alleges impropriety in the voting process and questions the motivations of these individuals in casting said votes. Defendants' actions in this regard constitute discretionary actions for which they are immune from liability. Judicial scrutiny of such discretionary actions would violate the political question doctrine and threaten the necessary immunity afforded legislators so that they may act without fear of personal liability. *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (S.C. App. 1995). Therefore, I find that these issues are not a proper inquiry for this Court, Defendants are entitled to legislative immunity for their actions as County Council members, and, therefore, the Plaintiff's claims should be dismissed.

## D. ADDITIONAL BAR UNDER S.C. R. CIV. P. 12(B)(8)

Finally, while the ruling regarding Plaintiff's lack of standing remains dispositive of all the issues raised by Defendants' various Motions to Dismiss, I find that Plaintiff would be further barred from pursuing the present action by Rule 12(b)(8) of the South Carolina Rules of Civil

Procedure. Rule 12(b)(8) provides that an action should be dismissed if "another action is pending between the same parties for the same claim." In the present case, the Plaintiff names, Joey Preston, Anderson County, and the individual Defendants, all as defendants in this case. The Plaintiff's Complaint seeks to undo the severance agreement granted by Anderson County to Joey Preston and to hold Preston, along with the individual defendants, liable to him personally for their votes in favor of the agreement. The case of *Anderson County v. Joey Preston and the South Carolina Retirement System*, C.A. No. 2009-CP-04-4482, which is pending in the Anderson County Court of Common Pleas, also seeks to revoke the severance agreement granted to Preston. The Plaintiff's suit, in this respect, is duplicative. Furthermore, the Anderson County case deals with the same substantive issues raised by the Plaintiff and involves the true parties in interest. Therefore, even if the Plaintiff were granted standing for this suit, all of his claims should be dismissed pursuant Rule 12(b)(8), S.C. R. Civ. P.

## III. CONCLUSION

Taken in the light most favorable to the Plaintiff, the Complaint fails to set forth facts and allegations that would confer Plaintiff standing to pursue his claims in the present action. Plaintiff's only conceivable means of obtaining standing under the present circumstances would be through the application of the public importance exception. However, this Court finds that the present controversy and the fact that Plaintiff seeks monetary damages derides against application of the exception. Lacking this fundamental constitutional requirement, Plaintiff's claims must be dismissed.

Further, Plaintiff's claim should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as there is currently an action pending before this Court that concerns the same issues, involves proper parties to the action, and seeks nearly identical relief.

As to the remainder of the issues and defenses raised in the Defendants' Motions to Dismiss, I make no ruling on them at this time.

I find that the Plaintiff lacks standing to proceed in this matter. The Defendants' Motions to Dismiss, as amended, are hereby GRANTED.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.
Tenth Judicial Circuit

11/22/2010
Anderson, South Carolina

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